FILED
OCT 19 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 537

WAYNE THOMAS LONERGAN,
Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

EDWARD V. BRODERICK,
Attorney for Petitioner.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9

INDEX

	PAGE
Petition for Writ of Certiorari	1
Jurisdiction of This Court	1
Opinions Below	2
Statutes Involved	2
Summary Statement of Matter Involved	3
(a) Introductory Statement	3
(b) Nature of the Case	4
(c) The Circumstances Under Which Petitioner's Confession Was Obtained	6
Question Involved	9
Reasons for the Allowance of the Writ	9
Brief in Support of Petition	11
Statement	11
Argument	11
The use of petitioner's alleged voluntary confession to obtain his conviction constitutes a violation of his rights and a denial of due process under the Fourteenth Amendment to the Constitution of the United States	11
Conclusion	16

Table of Cases Cited

PAGE

Ashcraft v. Tennessee, 322 U. S. 143, 88 L. ed. 1192.. 10, 15, 16
Brown v. Mississippi, 297 U. S. 278, 80 L. ed. 682..... 9
Chambers v. Florida, 309 U. S. 227, 84 L. ed. 716.....9, 15
Hooker v. Los Angeles, 188 U. S. 314..... 15
Hurtado v. California, 110 U. S. 516, L. ed. 232..... 15
Lisenba v. California, 314 U. S. 219, 86 L. ed. 166.....9, 15
Lyons v. Oklahoma, 322 U. S. 596, 88 L. ed. 1481.....10, 15
Malinski v. New York, ... U. S. ....; #367, Oct. 1944 Term, decided March 26, 1945; 89 L. ed. Adv. Op. 738 .....10, 15
McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608 87 L. ed. 819.....9, 13, 14
Palko v. Connecticut, 302 U. S. 319, 82 L. ed. 288.... 15
People v. Alex, 265 N. Y. 192..... 13
People v. Barbato, 254 N. Y. 170..... 13
People v. Doran, 246 N. Y. 409..... 13
People v. Elmore, 277 N. Y. 397..... 13
People v. Kelly, 264 App. Div. 14..... 13
People v. Kennedy, 159 N. Y. 346.....12, 13
People v. Malinski, 292 N. Y. 360..... 13
People v. Mummiani, 258 N. Y. 394.....12, 13
People v. Pantano, 239 N. Y. 416..... 12
People v. Pignataro, 263 N. Y. 229.....12, 13
People v. Trybus, 219 N. Y. 18..... 13
People v. Weiner, 248 N. Y. 118..... 13
Twining v. U. S., 211 U. S. 78, 53 L. ed. 97..... 14
U. S. v. Mitchell, 322 U. S. 65..... 14
Ward v. Texas, 316 U. S. 547, 86 L. ed. 1663..... 9

Other Authorities Cited

PAGE

Code of Criminal Procedure of the State of New York,
Section 165 . . . . . 3, 12
Section 395 . . . . . 3, 12

Constitution of the United States, Fourteenth Amendment 2, 9, 11, 16

Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1 (43 Stat. 937) Section 237(b) 2

Penal Law of the State of New York,
Section 1844 . . . . . 3, 12

28 U. S. C. A. § 344(b) 2

28 U. S. C. A. § 350 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

WAYNE THOMAS LONERGAN,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, WAYNE THOMAS LONERGAN, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York, affirming a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered February 23rd, 1945, which affirmed a judgment of the Court of General Sessions, New York County, entered upon a verdict convicting petitioner of the crime of murder in the second degree.

Jurisdiction of This Court

The judgment of affirmance of the Court of Appeals of the State of New York was rendered July 19th, 1945 (R.) and the remittitur to the Court of General Sessions, New York County, was amended by order dated

October 8, 1945 (R.). This petition is filed within three months from July 19, 1945, the date of affirmance, as required by law (28 U. S. C. A. § 350). The jurisdiction of this Court is conferred by Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1 (43 Stat. 937); 28 U. S. C. A. § 344(b).

The judgment of the Court of Appeals affirmed a judgment convicting the petitioner of the crime of murder in the second degree and sentencing him to State's Prison for a term of not less than thirty-five years nor more than the term of his natural life. The petitioner specially set up and claimed on appeal to the Appellate Division of the Supreme Court of the State of New York, and later in the Court of Appeals, that under the Fourteenth Article of Amendment to the Constitution of the United States, his right, privilege and immunity against being deprived by the State of New York of his life and liberty without due process of law was violated, and, as certified by the Court of Appeals, that point was considered and necessarily decided by that Court (Order Amending Remittitur, October 8, 1945, R.).

Opinions Below

There were no opinions written in the Courts below and the case is reported: *People of the State of New York* v. *Wayne T. Lonergan*, 269 App. Div. 662, affd. 294 N. Y. 942.

Statutes Involved

The Constitution of the United States, Amendment XIV, Section 1, in so far as material, provides:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 395 of the Code of Criminal Procedure of the State of New York provides as follows:

> "§ 395. Confession of defendant, when evidence, and its effect.
>
> "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

Section 165 of the Code of Criminal Procedure of the State of New York provides:

> "§ 165. Defendant, upon arrest, to be taken before magistrate.
>
> "The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

Section 1844 of the Penal Law of the State of New York provides as follows:

> "§ 1844. Delaying to take person arrested for crime before a magistrate.
>
> "A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

Summary Statement of Matter Involved

(a) Introductory Statement

The petitioner, WAYNE THOMAS LONERGAN, was convicted of the crime of murder in the second degree in the Court of General Sessions of the County of New York,

State of New York, on April 17th, 1944 and sentenced to State's Prison for a term of not less than thirty-five years nor more than the term of his natural life (R. 934-5).

On appeal to the Appellate Division of the Supreme Court of the State of New York, said judgment of conviction was unanimously affirmed without opinion (R. 969-70). Permission to appeal from said judgment of affirmance to the Court of Appeals was granted by an Associate Judge of that court on his certification that questions of law were involved which ought to be reviewed by the Court of Appeals (R. 971). After argument in the Court of Appeals the judgment of conviction was affirmed without opinion and the remittitur of that Court, as amended, recites that:

> "Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: The defendant argued that the admission of the alleged confession in evidence constituted a denial of due process and a violation of his rights under the Fourteenth Amendment to the Constitution of the United States. This Court held that the admission of the alleged confession in evidence was not a denial of due process or a violation of defendant's rights under the Fourteenth Amendment to the Constitution of the United States."

(b) Nature of the Case

The body of Patricia Lonergan, the petitioner's wife, was discovered in the bedroom of her apartment located in New York City, on the evening of October 23, 1943, under circumstances indicating that she was the victim of a brutal murder (R. 51-61, 128-9, 143-4, 185-6). There were no eyewitnesses to the tragedy and the testimony of the Medical Examiner presents the only evidence as to the time and manner in which the deceased met her death. He testified that in his opinion, "* * * the cause of death was asphyxia by strangulation, laceration of the scalp, frac-

ture of the skull, with contusion or bruising of the brain" (R. 80), and that the head wounds could have been caused by a blow from a blunt instrument of the same nature as a pair of broken candlestick holders which were found at the scene of the crime (R. 70). He estimated that death occurred from about eight to sixteen hours prior to the time he first saw the body, thereby fixing the time of death between 6 A. M. and 2 P. M. Sunday, October 24th, 1943 (R. 50-2). Petitioner did not take the witness stand and the only evidence directly connecting him with the commission of this crime is an alleged confession which, he claims, is involuntary and not the product of his free will. The prosecution and conviction of the petitioner is based solely on this confession, as fully appears from the Court's charge to the jury, that:

> "* * * Inasmuch as the People's case depends upon this confession, if you decide that you will not accept the confession as a voluntary statement, you must acquit the defendant" (R. 896).

When the petitioner's alleged voluntary confession was offered in evidence at the trial by the prosecution, the defense objected and was permitted to conduct a preliminary examination in the presence of the jury on the question of whether the confession was voluntarily and freely made (R. 295). The Court and jury heard the testimony of about twelve witnesses who took part in the arrest, detention and questioning of the petitioner. The objection to the admission of the confession on the ground of coercion and duress was overruled by the Trial Court and the matter was submitted to the jury under the charge that, "The question for the jury to decide is whether or not the confession was a voluntary one" (R. 893). The Trial Judge further instructed the jury that: "If you believe that this defendant was intimidated or subjected to duress and that the statement he made is not a voluntary statement, but an involuntary statement produced by the treatment he received, or

says he received, or that the defense says he received, and if you believe that he made that statement or confession as a result of duress, it would be your duty to disregard the statement and give it no weight or consideration whatever" (R. 895-6).

The Trial Judge did not instruct the jury in his main charge that unnecessary delay in arraignment constituted a crime under the Penal Law of the State of New York, and that those responsible therefor were guilty of oppression. After the attention of the Court was directed to this omission by defense counsel (Requests Nos. 13 and 14, R. 930), the Trial Judge charged as follows (R. 903-4):

> "As a legal proposition, it is generally true, as they say in request 13, that the police are guilty of oppression and neglect of duty when they wilfully detain a prisoner without arraigning him before a Magistrate within a reasonable time.
>
> "*We are not concerned with that particular violation of the law except as you are concerned with it, if you are, in considering the question as to whether or not this was a voluntary confession.* I have already read to you that section or called your attention to the fact that under our law, section of the Penal Code, it is the duty of the police to arraign promptly without unnecessary delay a person that is arrested.
>
> "I decline to charge any further on that subject." (Italics writer's.)

The Trial Judge also declined to charge that the use of a coerced confession to obtain a conviction constituted a denial of due process of law (R. 905, 932).

(c) The Circumstances Under Which Petitioner's Confession Was Obtained

The petitioner was arrested in Toronto, Canada, at 8 A. M. October 25th, 1943 and taken to Toronto Police Headquarters (R. 427-8, 431). At 12:15 P. M. he was photo-

graphed by the Criminal Identification Bureau (R. 207-8) and at 10 o'clock that same evening he was questioned extensively by members of the Toronto and New York police and an assistant district attorney from the office of the District Attorney of New York County (R. 230-3, 240, 353-4). When first observed by the New York District Attorney, the petitioner, "was lying on three chairs placed together with the backs adjacent to each other so as to form a sort of a bench" (R. 350). This questioning continued for about two hours until midnight (R. 354), after which petitioner was detained overnight (R. 427).

On Tuesday, October 26th, 1943, the day following his arrest, petitioner signed a prepared statement that was handed to him, stating that he desired of his own free will to return to New York City (R. 361-2). At 8 P. M. that evening, in custody of the New York law enforcement officers, he was taken from Toronto to the Union Railroad Station, Buffalo, New York, stopping en route for examinations before Canadian and United States Immigration Boards of Inquiry at Fort Erie, Canada, and Black Rock, New York (R. 364-5, 459-65, 515-19). The petitioner was then taken to the Statler Hotel, Buffalo, New York, where the detectives obtained a room at about 5:30 A. M. Wednesday morning, October 27th, 1943 (R. 467-8, 520). He reclined in that hotel room, under guard, on an iron cot until about 10 A. M. that morning, being alternately handcuffed to a chair and the iron cot which was provided for him (R. 468-9, 524-5). The party left Buffalo by plane at about 1 o'clock and arrived at LaGuardia Field in New York City at about 4:30 P. M., and petitioner was brought directly to the District Attorney's office of New York County at about 5 o'clock that afternoon (R. 475, 525-6).

Petitioner was taken to a room in the District Attorney's office in which there were present district attorneys and numerous officers and men of the New York Police Department (R. 477, 527, 536). During all this time no

warrant had been issued for the arrest of petitioner nor had he been indicted or arraigned before any judicial officer. He was forced to strip and submit to a medical examination by the Medical Examiner for the District Attorney (R. 300, 477, 527, 537). This examination lasted for about twenty or thirty minutes (R. 478, 527, 537, 382) and as soon as the petitioner was dressed, he was questioned by various police officials and assistant district attorneys for a period estimated as lasting from about one to two hours (R. 309, 381, 479, 529, 537). Later, he was questioned and cross-questioned at various intervals by numerous individuals. Assistant District Attorney Grumet questioned him again on and off from about 9:30 or 10 o'clock that evening until 2 o'clock the next morning (R. 316-18) and for about "half an hour or so" between 2 and 4 A. M. Thursday morning (R. 320). This questioning was always conducted in the presence of others (R. 321). Assistant District Attorney Loehr questioned petitioner at 10 o'clock Thursday morning for about half an hour (R. 386-8); between half to three-quarters of an hour shortly after 11 o'clock (R. 388-9), and for more than an hour after 1 o'clock Thursday afternoon (R. 396). Petitioner was also questioned on many occasions by police officials who came in and out of the room all night (R. 481-3). At about 11 P. M. Wednesday night he was subjected to a police lineup (R. 385).

At times there were as many as eight detectives in the room while petitioner was being questioned, and other people working on the case were constantly walking in and out of the room where the petitioner was being questioned (R. 311-14, 321). He was under constant guard (R. 383) and did not sleep during all the time he was held in the District Attorney's office. When he was not being questioned, he was either standing up and gazing out of the window or sitting on wooden chairs (R. 318, 484, 531). Some time during the detention period, District Attorney Loehr read sections of the Penal Law and Criminal Code

dealing with the crime of homicide to the petitioner and pointed out the various degrees thereof and the punishment for each degree (R. 406-7, 411-12). Petitioner denied his guilt (R. 320), until about 2:45 P. M. Thursday afternoon, October 28th, 1943, seventy-eight hours after his arrest in Toronto, and twenty-two hours after his arrival at the District Attorney's office in New York County. At that time, he yielded to his inquisitors' desires and made a detailed statement by which he inculpated himself as the perpetrator of the crime. Thereafter he was booked, fingerprinted and photographed (R. 497, 534). Arraignment before a Magistrate did not take place until Friday morning, October 29th, 1943 (R. 504, 534).

Question Involved

The question involved is whether the admission in evidence of the petitioner's alleged voluntary confession constituted a denial of due process and a violation of his rights under the Fourteenth Amendment to the Constitution of the United States.

Reasons for the Allowance of the Writ

The Court of Appeals of the State of New York has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court, in that the said Court of Appeals has affirmed a judgment and sentence of from thirty-five years to life, which, when tested by an appraisal of the totality of the facts in the case, discloses that petitioner was deprived of his liberty without due process of law. See: *Brown* v. *Mississippi*, 297 U. S. 278, 80 L. ed. 682; *Chambers* v. *Florida*, 309 U. S. 227, 84 L. ed. 716; *Lisenba* v. *California*, 314 U. S. 219, 86 L. ed. 166; *Ward* v. *Texas*, 316 U. S. 547, 86 L. ed. 1663; *McNabb* v. *United States*, 318 U. S. 332, 87 L. ed. 819;

Ashcraft v. *Tennessee*, 322 U. S. 143, 88 L. ed. 1192; *Lyons* v. *Oklahoma*, 322 U. S. 596, 88 L. ed. 1481; *Malinski* v. *New York*, ... U. S. ....; #367, Oct. 1944 Term, decided March 26, 1945; 89 L. ed. Adv. Op. 738.

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, demanding that Court to certify and send this Court for its review and examination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings of said Court of Appeals of the State of New York in this case, and that the judgment and order of said Court of Appeals affirming the judgment in this action may be reversed and that petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

WAYNE THOMAS LONERGAN,
Petitioner.

EDWARD V. BRODERICK,
Attorney for Petitioner.

State of New York,
County of New York, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one upon which the petition should be granted.

EDWARD V. BRODERICK,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Statement

A statement of the nature of the case, the statutes involved, the question presented, and the manner in which the jurisdiction of this Court is invoked, is set forth in the annexed petition. In the interest of brevity, this statement is not repeated here.

ARGUMENT

The use of petitioner's alleged voluntary confession to obtain his conviction constitutes a violation of his rights and a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

The charge of the Trial Court, which settles the law of the case, establishes the fact that, exclusive of the confession, the other evidence is insufficient to sustain the verdict of conviction (R. 896). Therefore, unless the confession was properly admitted in evidence the conviction of petitioner cannot stand.

There is no denial of the fact, and the record shows, that the arrest of the petitioner by the police at Toronto, Canada, took place on Monday, October 25th, 1943 at about 8 A. M., without a warrant or indictment, and that he was not arraigned any place until Friday, October 29th, 1943, four days or approximately ninety-six hours later. His alleged voluntary confession was obtained on October 28th, 1943 at about 2:45 P. M., seventy-eight hours after

the arrest in Toronto and approximately twenty-two hours after arrival in New York City. There is no denial of the fact that petitioner was extensively questioned and examined in Toronto for long hours, or that he was subjected to still further questioning without sleep for twenty-two hours after his arrival in New York City. The record further discloses evidence of vigorous treatment which was deliberately calculated and designed to overcome and subjugate the will of the petitioner. There is little room to doubt that this wilful detention of the petitioner for questioning without arraignment before a Magistrate within a reasonable time after his arrest was done, "for the purpose of subjecting him to an inquisition impossible thereafter" (*People* v. *Mummiani*, 258 N. Y. 394), in order to force an admission of guilt. At no point in the record is there any evidence or offer of evidence by the arresting officers who were on the witness stand to explain or justify the failure to arraign the petitioner in the manner provided by the laws of the State of New York.

The Code of Criminal Procedure of the State of New York (§ 395) provides that the confession, of a defendant can be given in evidence against him, unless made under the influence of fear produced by threats. The threat may be implied as well as expressed (*People* v. *Pantano*, 239 N. Y. 416, 419), and a confession that is not the product of a mind that is free and unconstrained is invalid (*People* v. *Pignataro*, 263 N. Y. 229, 240). The Code of Criminal Procedure (Sec. 165) also provides that the accused must in all cases be taken before a Magistrate without unnecessary delay; the failure to obey this statute is a crime (New York Penal Law, § 1844).

The practice of illegally detaining persons suspected of crime without arraignment before a Magistrate has been vigorously denounced and condemned by the New York courts, which have characterized this conduct by such words as "inquisition," "oppression" and "crime" (*Peo-*

ple v. *Kennedy*, 159 N. Y. 346, 361; *People* v. *Barbato*, 254 N. Y. 170, 178; *People* v. *Mummiani*, 258 N. Y. 394, 399; *People* v. *Malinski*, 292 N. Y. 360, 386; dissenting opinion of LEHMAN, *C. J.*; *People* v. *Kelly*, 264 App. Div. 14). Those courts have, nevertheless, exercised great restraint in the use of their judicial power to invalidate confessions obtained in this manner. The leading cases in the State of New York hold that a confession is to be excluded from evidence as a matter of law only in cases where the uncontradicted proof clearly shows the involuntary nature of the confession, but the courts have never gone to the extent of holding a confession inadmissible when obtained in defiance of the statute requiring prompt arraignment. They have held consistently that illegal detention is a mere circumstance to be weighed by the jury in deciding the factual question of whether or not such confession was coerced. Examination of these cases discloses that the only times the Court has exercised its power to exclude confessions as a matter of law have been in cases where some physical abuse was used either alone or in conjunction with other coercive practices. Seldom, if ever, have the New York Courts exercised their power to invalidate confessions where the proof establishes psychological, rather than physical pressure (*People* v. *Trybus*, 219 N. Y. 18; *People* v. *Doran*, 246 N. Y. 409; *People* v. *Weiner*, 248 N. Y. 118; *People* v. *Barbato*, 254 N. Y. 170; *People* v. *Mummiani*, 258 N. Y. 394; *People* v. *Pignataro*, 263 N. Y. 229; *People* v. *Alex*, 265 N. Y. 192; *People* v. *Elmore*, 277 N. Y. 397; *People* v. *Kelly*, 264 A. D. 14).

Courts exercising jurisdiction in Federal matters, on the other hand, have excluded confessions, as a matter of law where the evidence shows that the confession was obtained from an accused while under detention in violation of a Federal statute requiring prompt arraignment. The reasons for this principle of law, which are clearly stated in *McNabb* v. *U. S.*, 318 U. S. 332, 63 S. Ct. 608, 87 L. ed. 819, are worth repeating:

> "* * * Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, although universally rejected as indefensible, still find their way into use. It aims to avoid all the implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self defeating ways in which brutality is substituted for brains as an instrument of crime detection. A statute carrying such purpose is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application."

This doctrine and the reasoning upon which it is founded was followed with approval in *U. S.* v. *Mitchell,* 322 U. S. 65, where the Court reiterated that, "Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statement by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case which lead us to rule that a conviction on such evidence could not stand." The rule enunciated by these cases is confined exclusively to criminal trials in the United States courts, but similar reasoning should apply in state courts when the laws of the state provide for prompt arraignment as in the case of the Federal laws. Neither the rule or the reasoning of the *McNabb* case has been followed by the courts of the State of New York.

There is no comprehensive definition of "due process" (*Twining* v. *U. S.*, 211 U. S. 78, 53 L. ed. 97), and a state is at liberty to prescribe the mode of procedure by which

a fair opportunity is accorded to an accused to defend himself (*Hooker* v. *Los Angeles,* 188 U. S. 314; *Hurtado* v. *California,* 110 U. S. 516, 28 L. ed. 232; *Palko* v. *Connecticut,* 302 U. S. 319, 82 L. ed. 288; *Lisenba* v. *California,* 314 U. S. 219, 86 L. ed. 166). However, when a state has prescribed a mode of criminal procedure that requires prompt arraignment of an accused, and has also made it a crime for any law enforcement officer to deny or delay that procedure unnecessarily, such delay or denial is a denial of the process of law which the state has established for all persons accused of crime and a denial of due process of law under the United States Constitution. It also follows that when a state has decreed that the failure to comply with the provisions of the law requiring prompt arraignment of an accused is a crime, a confession obtained during that proscribed period must be regarded as having been obtained during the commission of a crime, and consequently tainted with illegality from inception.

This Court has emphatically adhered to the rule that the minimal requirements of due process are violated by the use of a confession extorted from an accused by overpowering his mental freedom in cases where the only force applied is psychological (*Ashcraft* v. *Tennessee,* 322 U. S. 143, 88 L. ed. 1192; *Lyons* v. *Oklahoma,* 322 U. S. 596, 88 L. ed. 1481; *Malinski* v. *N. Y.,* .... U. S. ...., Oct. 1944 Term, No. 367, decided March 26, 1945; 89 L. ed. Adv. Op. 738). Although reluctant to interfere with state court decisions, this Court has never hesitated to intervene for the purpose of making its own independent examination in the interests of justice when warranted by the facts (*Chambers* v. *Florida,* 309 U. S. 227, 228, 84 L. ed. 716; *Lisenba* v. *California,* 314 U. S. 219, 240, 86 L. ed. 166; *Ward* v. *Texas,* 316 U. S. 547, 550, 86 L. ed. 1663; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 88 L. ed. 1192; *Lyons* v. *Oklahoma,* 322 U. S. 596, 88 L. ed. 1481). The applicable decisions of this Court have denounced a conviction based on a confession obtained dur-

ing the illegal detention of an accused while he is held incommunicado and questioned by relays of inquisitors as a violation of that fundamental fairness which is the concept of justice itself, and prevents a fair, impartial trial in violation of the Fourteenth Amendment to the United States Constitution (*Ashcraft* v. *Tennessee*, 322 U. S. 143). The plain import of the decision in that case, and others which have followed in this court, is that no conviction based on a confession obtained after illegal detention and prolonged questioning will be permitted to stand.

The uncontradicted evidence of the circumstances attending the arrest, psychological pressure, persistent questioning and the unexplained, unjustified delay in arraignment of petitioner, presents clear and convincing evidence of the illegal and inherently coercive procedure under which the self-incriminating admissions were obtained. The use of this evidence, without which there could be no conviction, constitutes a denial of due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The petition presents a substantial question of Federal law which ought to be reviewed by this Court. Accordingly, the writ prayed for should issue.

Respectfully submitted,

EDWARD V. BRODERICK,
Attorney for Petitioner.

FILED
NOV 7 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1945

No. 537

WAYNE THOMAS LONERGAN,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
RICHARD G. DENZER
Assistant District Attorneys

MILTON H. SPIERO
Deputy Assistant District Attorney
Of Counsel

307 BAR PRESS, INC., 47 WEST ST., NEW YORK. BO. 9—0157 - 8

INDEX

	PAGE
PROCEEDINGS BELOW	1
NATURE OF CASE AND QUESTION PRESENTED	2
PRELIMINARY STATEMENT OF EVIDENCE BEARING ON THE KILLING	2
EVIDENCE BEARING ON THE VOLUNTARY NATURE OF THE PETITIONER'S CONFESSION	3
The petitioner's arrest and detention in Toronto	4
The trip from Toronto to New York County	5
Time elapsing between the petitioner's arrival at the District Attorney's Office and the commencement of his confession	6
The confession	7
The nature of the petitioner's treatment from the moment of arrest to completion of his confession	9
1. As to food and sleep	9
2. As to intoxication	9
3. As to threats and promises	10
4. As to abuse or harassment	10
ARGUMENT—No constitutional right of the petitioner was violated by the trial court's ruling admitting his confession in evidence	10
CONCLUSION—The petition for a writ of certiorari should be denied	14

TABLE OF CASES AND AUTHORITIES

PAGE

Ashcraft v. Tennessee (1944) 322 U. S. 143 ..... 10, 12, 13

Lyons v. Oklahoma (1944) 322 U. S. 596 13

Malinski v. New York (1945) 324 U. S. 401 13

People v. Leonardo (1910) 199 N. Y. 432 11
People v. Shilitano (1916) 218 N. Y. 161 11

Wigmore on Evidence (3d ed. 1940) Sec. 851, p. 320 13

Supreme Court of the United States

October Term, 1945

No. 537

WAYNE THOMAS LONERGAN,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Proceedings Below

The petitioner was convicted of the crime of MURDER IN THE SECOND DEGREE (Penal Law, § 1046) on April 17, 1944 in the Court of General Sessions of the County of New York (14).* The judgment of that court was unanimously affirmed without opinion by the Appellate Division of the Supreme Court (269 App. Div. 662) and by the Court of Appeals of the State of New York (294 N. Y. 942). The proceedings in the courts below are accurately set forth in the petition under the headings "Jurisdiction of This Court" (pp. 1-2) and "(a) Introductory Statement" (pp. 3-4).

* Unless otherwise indicated, references are to pages of the printed record.

Nature of Case and Question Presented

The petitioner stands convicted of the murder of his wife. Although the circumstances of the killing and the petitioner's conduct thereafter made it clear—as a matter of fact—that the petitioner was the killer, there could—as a matter of law—have been no conviction without the confession the petitioner made to an assistant district attorney, which confession was received in evidence at the trial.

The question here presented is whether any constitutional right of the petitioner was violated by the trial court's ruling admitting that confession in evidence.

Preliminary Statement of Evidence Bearing on the Killing

The dead body of Patricia Burton Lonergan was found lying on her bed at about eight o'clock on Sunday evening, October 24, 1943 (128-9, 142-5, 185). An autopsy disclosed that she had met her death as the result of assault and strangulation (70, 78-80, 99, 101). Suspicion was immediately directed at her husband, the petitioner, who had been separated from his wife for some time (245, 549, 571) and who was then serving with the Royal Canadian Air Force in Toronto (242-3, 548, 574). He was, accordingly, taken into custody by the Toronto authorities at about eight o'clock on the following morning, Monday, October 25 (427, 431).

When taken into custody, the petitioner was dressed in civilian clothes and was observed to have scratches on his face (Exhs. 15 and 16)—which scratches were ultimately shown to have resulted from the fatal struggle with his wife (555, 578).

That evening he gave a voluntary statement to an assistant district attorney of New York County in which

he denied any implication in the murder (240-87). He sought to account for his civilian clothes and the scratches on his face by saying that on the night before his arrest he had met a soldier, Murray Wooster, who had gone with him to the apartment of a friend and indulged in homosexual relations, and who had, thereafter, absconded with the petitioner's uniform, wristwatch and wallet (272-6).

Subsequently, after having been returned to New York, he repudiated his story about the alleged homosexual relations and formally confessed that he had killed his wife.

The petitioner's confession described in the minutest detail his activities before, during and after his fatal encounter with his wife (547-82). It was supported in many significant particulars by corroborative testimony given by disinterested persons of unchallenged integrity (Schonberg 622-46; Harjes 213-30; Forster 654-77; Levinson 611-22; Jaburg 591-611; Ashley 207-13).

Evidence Bearing on the Voluntary Nature of the Petitioner's Confession

Before the petitioner's confession was read into evidence, his attorney challenged its voluntary character and admissibility by calling twelve witnesses for *voir dire* examination concerning the defendant's arrest in Toronto, his return to New York and other events preceding and surrounding the making of the confession. Six of those witnesses gave no evidence now important (Hogan 419-23; Ferguson 437-40; Riendeau 440-3; Green 443-5; Quinn 446-7; McKeon 448-9). The other six were Detective Sergeant Arthur Harris of the Toronto Police Department; Detectives William Prendergast, Nicholas Looram and Acting Captain Daniel J. Mahoney of the New York City Police Department; and Assistant District Attorneys Jacob Grumet and John F. Loehr of New York County. Their testimony may conveniently be divided, according to subject matter, as follows: (a) the petitioner's arrest

and detention in Toronto; (b) his transportation to New York County; (c) the time elapsing between his arrival in New York County and the commencement of his formal confession; (d) his confession; and (e) the nature of the treatment accorded the petitioner from the moment of arrest in Toronto until the completion of his confession.

The petitioner's arrest and detention in Toronto (8 a.m. Monday to 7:30 p.m. Tuesday)

Arrested in Toronto at about eight o'clock Monday morning, October 25 (Harris 427), the petitioner was first taken to a restaurant for breakfast (Harris 431) and then lodged at police headquarters (Harris 427). That evening, from about ten o'clock until midnight, the petitioner was questioned by Assistant District Attorney Loehr and Detective Sergeant Harris, in the presence of a stenographer (Loehr 349-50, 353-4; Harris 431-3; *cf.* statement 240-87).

On Tuesday afternoon he had several brief talks with Detectives Harris, Prendergast and Looram, and with Mr. Loehr (Loehr 357-63; Harris 429, 430, 431, 432; Prendergast 454-7; Looram 510-2), in the course of which he executed a consent to return to New York (Loehr 361; Harris 429, 430; Prendergast 457), as follows (Exh. 26):

> "I desire of my own free will to return to the State of New York, in company with Officers Looram and Prendergast. It has been explained to me that when I arrive in that State a criminal charge may be laid against me, but notwithstanding this, I desire to return to the State of New York."

Before leaving for New York at about 7:30 Tuesday evening, the petitioner had a twenty minute visit with his "aunt and his uncle and his sister," whom the police had notified of his arrest (433, 434).

The trip from Toronto to New York County (7:30 p.m. Tuesday to 5:00 p.m. Wednesday)

The petitioner was taken by train from Toronto to Fort Erie, Canada; by car to Buffalo; and by plane to New York (Loehr 364-6; Prendergast 459-63; Looram 514-9, 525-6). During the entire trip, he was in the custody of Detectives Prendergast and Looram, Mr. Loehr accompanying them as far as Buffalo (Loehr 364-78; Prendergast 459-68; Looram 514-26).

Arriving at Buffalo about 2 a.m. on Wednesday, they spent the next few hours dining and trying to get railroad reservations to New York (Loehr 377; Prendergast 467; Looram 519-20). Unable to get accommodations for the entire group, the detectives took the petitioner to the Statler Hotel where they spent the night and had breakfast (Prendergast 468-9; Looram 520, 523-5), while Loehr continued to New York by train (Loehr 366, 378).

Leaving Buffalo by plane at about one o'clock that afternoon, the detectives and the petitioner arrived at LaGuardia Field at about 4.30 p.m. and reached the office of the District Attorney of New York County at about five o'clock (Prendergast 475; Looram 525-7).

The petitioner was subjected to no questioning about the crime during the trip from Toronto to New York (Prendergast 461, 474, 475; Looram 528; see also Loehr 375-6). Moreover, apart from some of the time spent in his hotel room in Buffalo (Prendergast 469; Looram 524-5), the petitioner was not handcuffed, but was allowed to assume the appearance of an ordinary traveler (Prendergast 466, 467).

Time elapsing between the petitioner's arrival at the District Attorney's Office and the commencement of his confession (5:00 p.m. Wednesday to 2:45 p.m. Thursday)

Upon arrival at the District Attorney's Office in New York County, the petitioner was immediately given a medical examination which lasted about twenty minutes (Loehr 382; Prendergast 477; Looram 527; Mahoney 537). As soon thereafter as he had dressed, he was questioned by Assistant District Attorney Grumet for a period of time variously estimated as lasting from three-quarters of an hour to about two hours [Grumet 309 ("about three-quarters of an hour"); Prendergast 479 ("approximately an hour"); Looram 529 ("About two hours"); Mahoney 537-8 ("about an hour or thereabouts")], after which he was taken to another room and given his supper (Prendergast 481, 485; Mahoney 539).

Between the conclusion of this first questioning and 2:45 the next afternoon, when he started to give his formal confession, the petitioner was interrogated twice by Mr. Grumet and three times by Mr. Loehr. Grumet's interrogations occurred "on and off" for a total of about two hours between about ten o'clock Wednesday evening and two o'clock the next morning (Grumet 316-7, 318); and for about "Half hour or so" some time between 2 and 4 a.m. on Thursday (Grumet 320-1). Loehr questioned the petitioner for "About a half an hour" at ten o'clock Thursday morning, in the presence of Detectives Prendergast and Looram (Loehr 386-8); between "half and three-quarters of an hour" shortly after eleven o'clock, in the presence of these same detectives (Loehr 388-9); and "alone" with the petitioner "for almost an hour" beginning at about one o'clock Thursday afternoon (Loehr 396).

In addition, he was placed in a lineup for identification purposes at about 11 p.m. on Wednesday (Loehr 384; Prendergast 484; Looram 532; Mahoney 540; Grumet 336),

and was, from time to time, the object of desultory questioning by the detectives as they proceeded about their duties in connection with the case (Prendergast 483; *cf.* Looram 530).

While they were not questioning the petitioner, Assistant District Attorneys Grumet and Loehr were either engaged in questioning other witnesses and investigating other aspects of the case, or were at their homes (Grumet 313, 317, 318-20; Loehr 386-7), while the police officers—who were never off duty from the time of the discovery of the murder until after the petitioner's arraignment (Prendergast 482; Mahoney 542)—were occupied with other problems in connection with the investigation (Mahoney 536-7). During such times, the petitioner was left alone save for a guard (Prendergast 483) and was variously observed "either standing up gazing out the window or sitting" (Prendergast 484; Looram 531).

The Confession

During the questioning by Grumet and the early questioning by Loehr the petitioner made no admissions of guilt, but adhered substantially to the denials and explanations contained in the Toronto statement (Grumet 333-4; *cf.* Loehr 404). However, during his 11 a.m. interview with Loehr, he began to ask "about the definitions of the different degrees" of homicide (Loehr 406, 412). The pertinent sections of the Penal Law were then "pointed out to him" (Loehr 406, 407, 411-2) with the explanation that, since the petitioner was the "only one in the room" at the time of the murder, no one knew of what degree of homicide he was guilty and "his story held the key to the whole situation, that no one would know it until he told it" (Loehr 417).

About an hour after this (406), the petitioner asked to speak "alone" to Mr. Loehr, and his request was

granted (Loehr 396, 416). Loehr then told the petitioner that Mr. Grumet and Captain Mahoney were "disgusted" with his "degrading" story about sodomous relations with a soldier, and that they did not think that "Lonergan had one shred of decency in his whole make-up" (Loehr 404). Loehr told him, however, that, knowing that "Lonergan had been educated in a Catholic school," he was sure that he must have acquired at least "one shred of decency or one redeeming trace in his make-up" (405) and that it was up to him to show

> "the benefit of his Catholic training and do at least one thing to save this whole situation, and * * * tell the truth and eliminate this Murray Wooster [the soldier] alibi story, with all its degrading results and effects" (Loehr 405).

Loehr told the petitioner that he himself "had been through the Catholic schools" and displayed his Fordham diploma as verification (Loehr 405).

Immediately after this interview, and after admitting that he understood "fully and clearly" that anything he might say could be used against him "in the future before a grand jury or before a trial jury" (confession 547), and acknowledging that he was willing to tell "the truth" as he had told it to Loehr "a short while ago" (confession 547), the petitioner made his formal confession giving, in his own words, a detailed account of the murder (Grumet 322-4; Loehr 410-1; Prendergast 488-9; Looram 532-3; see also, confession 546-82). As his story unfolded, he was at no time asked to change any statement he made or to frame his answers according to the wishes of his questioners (Prendergast 488, 489, 493; see, also, Vaccaro 584).

The petitioner was not asked to sign his confession, as it had not been transcribed at the time of his arraignment (Grumet 326).

The nature of the petitioner's treatment from the moment of arrest to completion of his confession

1. As to food and sleep

The petitioner was given breakfast immediately after his arrest in Toronto; was fed at all times during his detention there (Harris 431); was given dinner upon his arrival in Buffalo (Loehr 377; Prendergast 467); ate a "Very hearty" breakfast at the Hotel Statler the next morning (Prendergast 463); and, in the District Attorney's Office—pursuant to Mr. Grumet's instructions to "see that he gets whatever he wants to eat" (Mahoney 539)—he was given food "whenever he asked for it" (Grumet 327-8; Prendergast 481, 485-6; Mahoney 539, 543).

The petitioner was asleep at Toronto police headquarters when first seen by Mr. Loehr (Loehr 412); he "slept * * * all night" during his detention in Toronto (Harris 431); and for "about four hours" while at the Hotel Statler in Buffalo (Prendergast 463, 474). Like the detectives, he got no sleep after his arrival in New York City (Prendergast 482; see Grumet 323; Loehr 412). As to that, however, he made no complaint (Grumet 315).

2. As to intoxication

The petitioner was "perfectly sober" upon his arrival at the District Attorney's Office and at all times thereafter (Grumet 308; Loehr 412, 413; Prendergast 485; Looram 516, 531). The only liquor consumed by him between the time of his arrest on Monday morning and the completion of his confession Thursday afternoon was a half pint of his own brandy, which he shared with the detectives during the train trip from Toronto to Fort Erie on Tuesday evening—two days prior to the confession (Loehr 413; Prendergast 469-73; Looram 516, 525-6).

3. As to threats and promises

The petitioner was not threatened that, if he failed to confess, he would be prosecuted for sodomy or any other crime or that publicity would be given to his homosexual activities; nor was he promised immunity from such prosecution or publicity as a reward for confessing (Grumet 309, 311; Loehr 401, 405, 408-9, 417; Prendergast 460-1, 474, 479, 482-3; Looram 514, 528; Mahoney 538-9, 540). It was never suggested to him that, if he confessed, he might be allowed to plead guilty to some lesser degree of homicide (Loehr 408-9, 417).

4. As to abuse or harassment

At no time during his detention "was the defendant abused, threatened, or in any way harassed" (Grumet 309, 330; Loehr 355, 398; Harris 430, 433; Prendergast 457, 461; Looram 528-30, 532; Mahoney 538-9, 540). He was never refused advice of counsel; indeed, he never asked leave to consult an attorney (Grumet 329-30; Loehr 357; Harris 428).

ARGUMENT

No constitutional right of the petitioner was violated by the trial court's ruling admitting his confession in evidence.

The petitioner's contention that the admission of the confession in evidence violated his constitutional rights, appears to rest upon the assumption that it was obtained while the petitioner was "held incommunicado and questioned by relays of inquisitors" (Petition and Brief, p. 16) in the manner condemned by this Court in *Ashcraft* v. *Tennessee* (1944) 322 U. S. 143. Nothing could be further from the truth.

The petitioner was not held *incommunicado* and was not denied the right to counsel. On the contrary, during

his detention in Toronto he visited with relatives (434), and he never asked to see any lawyer, other relative or friend (329-30, 357, 428). In this connection, it is significant that, although his visit with members of his family took place long after the cause of his arrest had been fully explained to him and he was thus given every opportunity to send for an attorney if he wanted one, there is no suggestion in the record that any lawyer ever attempted to gain access to him prior to arraignment. This, of course, buttresses the affirmative testimony of the *voir dire* witnesses that, in fact, he never requested legal counsel [see *People* v. *Shilitano* (1916) 218 N. Y. 161, 164; *People* v. *Leonardo* (1910) 199 N. Y. 432, 446].

Nor was the petitioner subjected to questioning "by relays of inquisitors." The uncontradicted testimony is that, during the twenty-two hours elapsing between his arrival at the District Attorney's Office and the commencement of his formal confession, he was examined—only intermittently—for periods totalling seven hours at the most (*supra*, pp. 6-7). Further, during the intervals between these periods of questioning, he was subjected to no harassing tactics of any nature. On the contrary, left alone save for a guard, he spent his time either eating or "standing up gazing out the window or sitting" (*supra*, p. 7).

Indeed, the only circumstance upon which a claim of duress might conceivably have been based is the fact that the petitioner was not arraigned immediately upon his arrival in New York County, but was detained in the District Attorney's Office while the law enforcement officials—by questioning him and other witnesses—completed their investigation of the case. That consideration, however, was repeatedly and forcibly brought to the attention of the jury by the trial court's charge. Not only did the court peremptorily instruct the jury to acquit the petitioner unless they found beyond a reasonable doubt that his alleged confession was wholly voluntary (895-6, 897,

916), but it specifically advised them that, in coming to a decision "on the question as to whether or not the alleged confession was a voluntary one" (906), they might consider any delay in arraignment (893-4, 906, 914, 916). Thus, in response to a request from the petitioner, the trial court told the jury (906):

> "I have already charged the jury, and I will charge them again, that the failure to arraign the defendant from the time he was brought to New York, which was Wednesday, until Friday, October 29th, in the morning, may be considered by them on the question as to whether or not the alleged confession was a voluntary one.
>
> "And of course, voluntary means free, it means not by compulsion, a free confession is a confession which is not made under threat, duress, a condition of the mind which is free and unconstrained, that is what voluntary means."

In view of the foregoing instructions, there can be no question that the jury affirmatively found beyond a reasonable doubt that the confession was "not made under threat [or] duress" but that the petitioner confessed when he was in "a condition of the mind which * * * [was] free and unconstrained."

Nothing said or decided in *Ashcraft* v. *Tennessee*, *supra*, 322 U. S. 143, raises any doubt as to the propriety of the conviction herein. Ashcraft, arrested one Saturday evening, was taken to the county jail, placed "with a light over his head" in a room "equipped with all sorts of crime and detective devices such as * * * high-powered lights," and subjected to continuous and virtually uninterrupted questioning for thirty-six hours before (322 U. S., p. 149), on the following Monday morning, he allegedly confessed (*id.*, pp. 151-152). Although the thirty-six hour quizzing to which he was thus subjected was so intense that the officers conducting it became exhausted and had to work "in relays," the defendant himself,

except for a "single five minutes' respite" was never given a moment's relief from this "continuous stream of questions" (*id.*, p. 149).

In such circumstances, this Court in an opinion calling sharp attention to the general weakness of the evidence of guilt (*id.*, at pp. 148-153), the inadequacy of the trial judge's charge (*id.*, pp. 146-148), and the "hopeless conflict" existing in the testimony (*id.*, pp. 149-150), concluded that the situation disclosed was "so inherently coercive" as to render use of the confession so obtained a violation of the accused's rights under the Fourteenth Amendment (*id.*, pp. 154-155).

It is patent from the evidence already discussed (*supra*, pp. 4-10), that the situation at bar is not even remotely analogous to that in the *Ashcraft* case. Instead of being taken to the county jail and placed "with a light over his head" in a room "equipped with all sorts of crime and detective devices such as * * * high-powered lights," this petitioner was questioned in an ordinary lawyers' room in the District Attorney's Office [*cf.* 3 Wigmore *On Evidence* (3d ed. 1940) §851, p. 320]. Instead of being examined virtually continuously for thirty-six hours by officers working "in relays," this petitioner was questioned intermittently for a maximum of seven hours over a total period of twenty-two hours. Consequently, instead of being permitted only a "single five minutes' respite" from his questioning, this petitioner's periods of "respite"—during which he was in no way harassed and was given food "whenever he asked for it" (485)—far exceeded his periods of interrogation. Moreover, there is no "hopeless conflict" in the evidence at bar. On the contrary, the facts outlined above stand uncontradicted in the record.

The facts in *Lyons* v. *Oklahoma* (1944) 322 U. S. 596, and *Malinski* v. *New York* (1945) 324 U. S. 401, the other cases relied upon by the petitioner, are so disparate from those at bar that they do not warrant discussion.

Conclusion

The petitioner was convicted after a scrupulously fair trial. No constitutional question is presented by the trial court's ruling admitting the petitioner's confession in evidence.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
RICHARD G. DENZER
Assistant District Attorneys

MILTON H. SPIERO
Deputy Assistant District Attorney
Of Counsel

November, 1945